UNITED STATES INTERNATIONAL TRADE COMMISSION

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In re Docket No. 1441

Request for a review investigation under section 751(b) of the Tariff Act of 1930, 19 U.S.C. § 1675(b), relating to porcelain-on-steel teakettles from Taiwan.

VIEWS OF THE COMMISSION

Background

In November 1986, the Commission determined that an industry in the United States was materially injured by reason of less than fair value (LTFV) imports of porcelain-on-steel cookware from Taiwan. 1/ During the investigation, the Taiwanese respondents asserted that teakettles were a separate like product produced by a corresponding separate domestic industry. Nonetheless, the Commission determined that teakettles do not constitute a separate like product. 2/ In its decision, the Commission found only one like product consisting of all domestically produced porcelain-on-steel

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1/ Porcelain-on-Steel Cooking Ware from Mexico, The People's Republic of China, and Taiwan, Inv. No. 701-TA-265 (Final) and Inv. Nos. 731-TA-297-299 (Final), USITC Pub. 1911 (1986) (Cooking Ware).

2/ Cooking Ware, USITC Pub. 1911 at 6 (Commissioner Rohr dissenting).

cooking ware and only one domestic industry consisting of the domestic producers of that product. 3/

On April 21, 1988, the Commission received a request to conduct an investigation under section 751(b) of the Tariff Act of 1930. The request was filed on behalf of M. Kamenstein, Inc. (Kamenstein), an importer of porcelain-on-steel teakettles from Taiwan. 4/

Kamenstein alleges that, applying the criteria in the case of Steel Pipe from India, discussed infra, good cause exists for initiating a review before 24 months after the date of publication of the notice of the Commission's affirmative determination. 5/ Specifically, Kamenstein asserts that "GHC's cessation of teakettle production a mere three months after the issuance of the antidumping order constitutes at the very least misfeasance, since GHC

3/ Id. Commissioner Rohr determined that there are two like products and two domestic industries, that producing porcelain-on-steel teakettles and that producing porcelain-on-steel cooking ware. Cooking Ware at 4 n.5.

4/ The Commission published notice of the request in the Federal Register and requested comments concerning institution of a section 751(b) review investigation. 53 Fed. Reg. 21531 (June 8, 1988).

5/ Section 751 provides in pertinent part:

> (b)(2) Limitation on period for review.--In the absence of good cause shown--
>
> (A) the Commission may not review a determination under section 1671d(b) or 1673d(b) of this title, . . .
>
> less than 24 months after the date of publication of notice of that determination. . . .

19 U.S.C. § 1675(b).

must have known at the time of the ITC proceedings that such cessation was likely, if not certain, and should have informed the ITC of that likelihood." 6/ Kamenstein concludes that withholding this information from the Commission constitutes misfeasance or fraud on the Commission. 7/

Kamenstein also alleges that circumstances in the domestic industry have changed sufficiently to warrant a review of the Commission's determination. 8/ Specifically, Kamenstein urges that "there is no longer a domestic industry producing porcelain-on-steel teakettles, because the sole domestic producer, General Housewares Corporation (GHC), permanently ceased production of these articles" around March 1987. 9/ Kamenstein maintains that cessation of domestic production constitutes changed circumstances sufficient to warrant review. 10/

6/ Kamenstein's petition at 3.

7/ Id. at 4.

8/ Section 751 provides in pertinent part:

> (b) Review upon information or request.--
> (1) In general.--Whenever the administering authority or the Commission receives information concerning, or a request for a review of, . . . an affirmative determination made under section 1671c(h)(2), 1671d(a), 1671d(b), 1673(h)(2), 1673d(a), 1673d(b), 1676(a)(1), or 1676a(a)(2) of this title, which shows changed circumstances sufficient to warrant a review of such determination, it shall conduct such a review after publishing notice of the review in the Federal Register. . . .

19 U.S.C. § 1675(b).

9/ Petition for Review Investigation of M. Kamenstein, Inc. (Kamenstein's petition) at 1. Since 1978, GHC has been the sole U.S. producer of porcelain-on-steel cooking ware. Cooking Ware (Final) at A-6.

10/ Id. at 5.

Kamenstein argues further that, if GHC has committed no fraud or misfeasance, there has nonetheless been a mistake of fact because the Commission's original finding as to teakettles was predicated on the supposition that porcelain-on-steel teakettles would continue to be produced in the United States. According to Kamenstein, since the supposition has proven false, "there has been a mistake of fact which renders the original proceeding unfair." 11/ Finally, Kamenstein claims that even if GHC's quitting the teakettle business does not fall strictly within the criteria set forth in the India Pipe case, there is no domestic production of porcelain-on-steel teakettles and, therefore, consumers are being burdened with costs without a corresponding domestic benefit.

GHC, petitioner in the original investigation, filed a response to the request on May 11, 1988. GHC asserts that, contrary to the petition's allegations, it did not permanently cease teakettle production in March 1987, it had no intention of ceasing teakettle production at the time of the Commission's final determination, and it has produced teakettles as recently as December 1987. 12/ Further, GHC states that it has engaged a design group to develop a new generation of teakettle shapes and intends to resume full production of teakettles as soon as a new design is developed that can be profitably produced. 13/

GHC also asserts that teakettles are only one of the hundreds of individual cookware items subject to the Commission's final determination

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11/ Id. at 4.

12/ GHC's Response to the Request of M. Kamenstein for Review Investigation (GHC's Response) at 1, 3.

13/ Id. at 2.

and that suspension of one of these hundreds of items "cannot, as a matter of law, constitute changed circumstances sufficient to warrant a review of the Commission's determination." 14/ Relying on the Commission's Turkish Review Determination, GHC adds that "good cause will only be found in an unusual case." 15/ According to GHC, the allegations in Kamenstein's petition do not come close to meeting that standard. 16/

Kamenstein filed a reply to GHC's response on May 13, 1988. Kamenstein maintains that it is seeking review of the dumping order only as it pertains to teakettles. Kamenstein also asserts that GHC's statement that it had not ceased production of teakettles contradicts what counsel for Kamenstein was told by a person identified as being in charge of teakettles at GHC. Finally, Kamenstein points to the indefinite nature of GHC's plans to resume teakettle production with a new design.

In response to Kamenstein's request, the Commission published a notice of the petition and requested public comments thereon. 17/ After considering the petition, the responses, and the public comments, 18/ we have determined that the petition does not show good cause and changed circumstances sufficient to warrant institution of a review investigation. 19/

14/ Id. at 2.

15/ Id. at 3.

16/ GHC's Response at 3.

17/ 53 Fed. Reg. 21531 (June 8, 1988).

18/ Counsel for Kamenstein and GHC both submitted comments in response to the Federal Register notice which essentially reiterated the arguments presented in their prior submissions.

19/ 19 U.S.C. § 1675(b); 19 C.F.R. § 207.45(a)(i).

DISCUSSION

1. Introduction

Whenever the Commission receives a request to conduct a review investigation prior to 24 months after the date of publication of notice of its final affirmative determination, it must determine whether good cause exists for conducting a review investigation before the 24 month anniversary of the Commission's determination and, if so, whether changed circumstances in the industry warrant such a review. 20/

In this particular request and in Kamenstein's supplemental submissions, the allegations relating to both good cause and changed circumstances arise from a single basic factual allegation. That allegation relates to the cessation of production of porcelain-on-steel teakettles. This alleged cessation is asserted to form good cause for an investigation on three grounds: (1) that the failure of the domestic industry to inform the Commission of the impending cessation of production was misfeasance or fraud that taints the original determination; (2) that the cessation of production created a mistake of fact that renders the original proceedings unfair; and (3) that the cessation of production of the teakettles is the kind of reduction in domestic production that the Commission referred to in initiating a review investigation in Frozen Concentrated Orange Juice from Brazil (FCOJ). 21/

20/ 19 U.S.C. § 1675(b). See also Indian Review Determination at 3, Commission Memorandum Opinion, in re Action Request No. 87-46; Request for review investigation under section 751(b) of the Tariff Act of 1930, 19 U.S.C. § 1675(b) (institution of an investigation prior to 24 months after the date of publication of notice of a final affirmative determination by the Commission requires the presence of both sufficient changed circumstances and good cause).

21/ 49 Fed. Reg. 34312 (Aug. 29, 1984). See Petitioner's Comments in Support of Institution of Investigation at 8.

This same allegation, it is claimed, constitutes sufficient changed circumstances to warrant a review investigation in that it is a significant change in the production of the domestic industry. We further note that Kamenstein's request argues for the separate revocation of the dumping order in this case as it applies only to porcelain-on-steel teakettles, not on porcelain-on-steel cookware generally.

Preliminarily, we note, as a factual matter, that despite the claim by Kamenstein that GHC ceased teakettle production in March 1987, GHC continued to produce teakettles during every month of 1987 except for November. Moreover, GHC has continued to sell teakettles during 1988 and is currently considering a design for a new line of teakettles. In addition, GHC has retained its production facilities for manufacturing teakettles.

2. Good Cause

In our opinion relating to a request for review of the order in welded carbon steel pipes and tubes from Turkey (Turkish Review Determination) 22/ the Commission stated:

> By enacting the good cause provision, Congress intended to create a tougher standard for instituting a review investigation when a request is filed within 24 months. The language used in section 751 indicates that good cause will be found only in an unusual case. . . . In fact, the Commission has instituted a section 751 review investigation prior to 24 months after publication of an injury determination in only one instance. . . . What constitutes good cause will necessarily depend on the facts of a particular case. As a general matter, some situations clearly would fall within the purview of the

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22/ Commission Memorandum Opinion, in re Docket No. 1394; Request for review investigation under section 751(b) of the Tariff Act of 1930, 19 U.S.C. § 1675(b).

> good cause provision such as: (1) fraud or misfeasance in the original investigation; (2) acts of God, as exemplified in the FCOJ case where a severe freeze sharply reduced U.S. producers' shipments of frozen concentrated orange juice; and (3) a mistake of law or fact in the original proceeding which renders the original proceeding unfair. This list, of course, is by no means exhaustive. 23/

First, with respect to the issue of misfeasance or fraud, we refer initially to the fact that production of teakettles did not cease as alleged. The Commission takes very seriously allegations that any party to an investigation is not forthright in providing information that is relevant to its investigations. That there are changes in production policies as industries react to the market either before or after a Commission investigation are to be expected. We find there is no misfeasance or fraud in this situation. Thus, there is no good cause to conduct a review investigation.

With respect to the mistake of fact issue, again, teakettle production did not cease as alleged. Accordingly, there has been no mistake of fact with respect to the Commission's original proceeding because porcelain-on-steel teakettles continued to be produced following the Commission's determination.

With respect to Kamenstein's third good cause ground, we find analogies to FCOJ uncompelling. Initially, we note that the events in FCOJ affected production of the "subject product", which in that case was frozen concentrated orange juice. By analogy, the subject product here is all porcelain-on-steel cookware. Even if GHC had ceased its production of teakettles, as asserted, that production accounts for only a small percentage of total cookware included within the definition of the like product.

23/ Id. at 5-6. These criteria were reiterated in the Commission's opinion relating to a request for review of the order in welded carbon steel standard pipes and tubes from India. (Indian Review Determination).

Moreover, what the facts show is at most a temporary change in production policies as the industry develops new marketing devices, i.e., a new line of teakettles. A voluntary decision to temporarily cease production of one product is not unusual nor significant in this type of industry. Such an option is one of many alternatives that should be available to a company as it attempts to deal with various changes in its business environment. On none of the above grounds is there good cause for conducting the review investigation.

Having found that good cause for instituting a review investigation prior to 24 months after publication of our injury determination is lacking, our inquiry essentially ends here. However, for the purposes of any appeal, we have also examined whether the petition alleges sufficient changed circumstances to warrant institution of a review investigation.

3. Changed Circumstances

In Avesta AB and Avesta Stainless Inc. v. United States, 24/ the Court of International Trade addressed the standard applied by the Commission in determining whether changed circumstances are sufficient to warrant a review of an affirmative injury determination. The court stated:

> [W]hile the decision to undertake a review is a threshold question, this decision, pursuant to statute and regulations, may be made only when it reasonably appears that positive evidence adduced by the petitioner together with other evidence gathered by the Commission leads the ITC to believe that there are changed circumstances sufficient to warrant review. In making its determination, the ITC must be permitted to weigh conflicting evidence because "if [the ITC] were required to disregard all evidence tending to disprove the

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24/ No. 85-10-01497, slip. op. 88-72 (C.I.T. June 7, 1988).

> allegations in a petition, there would be neither reason nor incentive for parties other than petitioners to present their views." American Lamb, 785 F.2d at 1003. Because § 1675(b) provides that a review shall be undertaken by the ITC upon receipt of a request for review that shows changed circumstances sufficient to warrant review, the party seeking revocation bears the initial burden of showing the existence of such circumstances. 25/

The court also stated that "it is not enough for a petitioner to simply allege the existence of changed circumstances. The petitioner must come forward with sufficient facts in support of the allegations, see, e.g., § 1675(b)(1), and the record as a whole must support these allegations." 26/

The court added:

> To require the ITC to conduct a review in all cases for the purpose of eliciting concrete evidence would be to ignore the different stages in the proceedings. It would further prevent the agency from fulfilling its duty to weed out those cases clearly without merit. 27/

As noted above, the Commission determined that the domestic industry consisted of the domestic producers of all domestically produced porcelain-on-steel cooking ware, including teakettles. Accordingly, Kamenstein alleges that the reduction of production of porcelain-on-steel cooking ware, based on the temporary cessation of teakettle production (which accounts for a small percentage of shipments of porcelain-on-steel cooking ware), standing alone, constitutes changed circumstances sufficient to warrant a review investigation. The Commission finds that the temporary production stoppage of a product included within the definition of the like product does

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25/ Avesta, slip. op. at 18-19.

26/ Avesta, slip. op. at 29 (citing American Lamb, 785 F.2d at 1003-04).

27/ Avesta, slip. op. at 29 (citing American Lamb, 785 F.2d at 1002).

not constitute a change in circumstances sufficient to warrant a review investigation. Kamenstein has presented no other evidence or arguments in its request which suggest that the Commission should review its like product determination. 28/

We finally note that Kamenstein's request for a review investigation is fundamentally a request to the Commission to change its like product determination. As was noted in the recent Commission determination in Liquid Crystal Display Television Receivers from Japan, 29/ a request for the exclusion of an article from the scope of a dumping duty can only be granted if it is found that the article is a like product separate from the other articles covered by the dumping duty. In such a case, then, the request must also challenge the like product determination. There must be good cause and changed circumstances which implicate the like product determination. In this case, no such allegations were made, and for that reason alone, the request would fail.

For the reasons stated above, the Commission determines that the petition does not show good cause or changed circumstances sufficient to warrant institution of a review investigation.

28/ There is no allegation here, as there was in the FCOJ case, that imports of teakettles from Taiwan are too low to constitute a threat of material injury or even that imports have declined. Both of these factors were considered by the Commission when it instituted the FCOJ case.

29/ Inv. No. 751-TA-14, USITC Pub. 2042 at 13 and Additional Views of Commissioner David B. Rohr at 15-18 (1987).

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